No. 9196

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY,
a Corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S BRIEF

McMICKEN, RUPP & SCHWEPPE,
ALFRED J. SCHWEPPE,
J. GORDON GOSE,
Attorneys for Appellee.

657-671 Colman Building,
Seattle, Washington.

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

The appellee has no fundamental difference with the facts of this case as set out in the statement in appellant's brief. However, for the convenience of the court, and to point the way toward the argument on behalf of the appellee, a short resume of the facts is here given.

In large measure the facts are entirely undisputed. During the months of September and October, 1936, the appellee, as seller, and the appellant, as buyer, entered into a number of contracts for the sale of

Hemlock logs for shipment to the Orient. These contracts, which are more fully described in the pleadings (Tr. 1 to 8) and in the District Court's findings of fact (Tr. 203 to 208), called for delivery and shipment in different specified months during the latter part of the year 1936 and the first of the year 1937. All deliveries and shipments were to be made at either Grays Harbor or Willapa Harbor in the State of Washington.

After the making of the contracts a strike of longshoremen occurred in all seaports of the Pacific Coast of the United States of America, including Grays Harbor and Willapa Harbor. This strike commenced on October 28, 1936, and continued without interruption until February 5, 1937. All shipments which under the terms of the contracts were to be made prior to October 28, 1936, were made before the strike commenced, and all shipments which under the express terms of the contracts were to be made in the months following the cessation of the strike were likewise made. No delivery or shipment of logs was made by the appellee, seller, as to any logs which under the terms of the contract were to be made during the time the strike was in progress; thus, if a contract provided for shipment in the month of November or December of 1936, or January of 1937, the amount of logs which the contract called for in those months was never delivered to the appellant, purchaser. The appellant at the trial conceded that the strike rendered delivery and shipment impossible during these months (Tr. 33).

All of the contracts (Tr. 44 to 46) contained the

following language affecting non-performance by reason of causes beyond the control of the parties:

"General Conditions:

"Delivery and/or shipment of materials under this contract is subject to acts, requests, or commands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, *and the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned* by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought, *strikes, lockouts, or labor disturbances*, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before enumerated, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of lading, or for outturn. *Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days.* The conditions of usual charter party and/or bills of lading are hereby accepted by the buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

"Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

"In the event of war affecting this contract,

the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyers' account, if it can be obtained.

"The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

"This contract is to be governed by the laws of the State of Washington, U.S.A., so far as applicable, and otherwise by the laws of the United States of America."

We have employed italics in the above quotation to specify the particular clauses which are deemed pertinent to the issues involved in this case.

Following the cessation of the strike, as is manifest from the appellant's claim for damages (Tr. 79 to 82), freight rates on log shipments had increased very substantially. The appellant insisted that appellee was obligated to proceed to deliver the logs which normally according to the express terms of the contract should have been delivered during the strike period. The appellee maintained that time was of the essence of the contracts, and that the obligation to perform was permanently excused as to all shipments which were prevented by the strike from being made in the express months specified in the contracts themselves as the time of shipment and delivery.

These adverse contentions squarely raise the question as to what rules of law are applicable to the contract provisions above quoted. The appellant, how-

ever, further maintained that regardless of the legal interpretation or effect of the contract it was entitled to show a trade custom or usage requiring the appellee, as seller, under such circumstances to perform the contracts within a reasonable period of time after the termination of the strike. The existence or lack of existence of such a custom is the only controverted fact on this appeal.

At the trial the parties agreed that if the appellant was entitled to recover, the measure of its damage was the sum of $17,272.17.

The trial court, at the termination of the trial, and after exhaustive argument upon the part of counsel, took the case under advisement and later rendered a written decision in favor of the appellee (Tr. 193 to 203) upon all of the issues. In conformity with this decision the trial court entered findings of fact (Tr. 203 to 212) in which were included all of the material undisputed facts which we have already mentioned. In addition the trial court found that no such trade custom or usage as that asserted by the appellant existed with respect to the contracts before the court.

The trial court also made conclusions of law (Tr. 212-213) including therein the conclusion that under the terms of the contracts the appellee, upon the cessation of the longshore strike, was under no obligation to sell, ship or deliver to the appellant any logs which under the terms of the contracts were to be shipped or delivered during the months of October, November and December, 1936, and January, 1937. In accordance with these findings and conclusions

judgment was rendered in favor of the appellee, seller, and from that judgment the appellant has appealed.

QUESTIONS INVOLVED

Although the appellant in its brief has made thirteen specifications of error, there are only three questions raised upon this appeal.

First, was the trial court correct in its conclusion that under the terms of the contracts the appellee, as seller, was permanently excused from the obligation of performing the contracts as to the amounts of lumber which according to the contracts were to be shipped during the period while the strike was in effect?

Second, was the trial court correct in sustaining the objections of the appellee to certain questions as to the existence of custom and usage with respect to contractual provisions similar to those involved in this case?

Third, was the trial court correct in finding from the evidence that, as a matter of fact, no such custom or usage of the character asserted by the appellant existed?

ARGUMENT

Upon the termination of the strike, appellee was under no duty to deliver any of the logs, which it had theretofore been impossible to deliver by reason of the strike.

The foregoing provision involves no question of fact whatsoever. As we have already pointed out, it was conceded that the strike of longshoremen which extended from October 28, 1936, to February 5, 1939, made it impossible for the defendant to perform its contracts during that period. There is likewise no controversy that each of the contracts contained the following provision:

> "* * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes, lockouts, or labor disturbances * * *. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days."

Each of the contracts also contained the following language:

> "The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it."
>
> "This contract is to be governed by the laws of the State of Washington, U.S.A., so far as applicable, and otherwise by the laws of the United States of America."

The immediate question presented is—Does the *force majeure* clause above set forth create merely a temporary excuse for performance and require the

seller to go forward with performance after the impediment thereto has ceased, or does it permanently excuse performance when such performance was effectively prevented by the strike during the period specified by the contract?

Under the authorities there can be no doubt that the majority rule is that the excuse is permanent; in other words, if performance is prevented during the period specified by the contract, the seller is absolutely relieved from his obligation to make delivery.

In Williston on Contracts, §1968, in speaking upon this point the author says:

> "If such a clause becomes operative and excuses the promisor from performance, the excuse has been held not merely temporary, operative only while the casualty continues, but a permanent excuse for nonperformance, unless the contract provides that delay only shall be excused."

In connection with the last clause of this quotation, it should be observed that the contracts here involved not only excuse performance in the event of delay, but also in the event of nonshipment or nondelivery.

The foregoing text statement is amply sustained by the authorities, of which we submit the following as the best expressions upon the subject.

Kunglig Jarnvagsstyrelsen v. National City Bank (C.C.A. 2) 20 F. (2d) 307;

Hull Coal & Coke Co. v. Empire Coal & Coke Co. (C.C.A. 4) 113 Fed. 256;

Atlantic Steel Co. v. R. C. Campbell Coal Co. (U.S.D.C. Ga.) 262 Fed. 555;

Edward Maurer Co. v. Tubeless Tire Co. (C.C.A. 6) 285 Fed. 713;

Indiana Flooring Co. v. Grand Rapids Trust Co. (C.C.A. 6) 20 F. (2d) 63;

Normandie Shirt Co. v. J. H. & C. K. Eagle, 238 N. Y. 218, 144 N. E. 507;

Black & Yates, Inc. v. Negros-Philippine Lumber Co., 32 Wyo. 248, 231 Pac. 398;

Ladd Lime & Stone Co. v. MacDougald Construction Co., 29 Ga. App. 116, 114 S. E. 75;

General Commercial Co. v. Butterworth-Judson Corp., 191 N. Y. S. 64;

Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N. E. 115;

New England Concrete Const. Co. v. Shepard & Morse Lbr. Co., 220 Mass. 207, 107 N. E. 917;

Obear-Nester Glass Co. v. Mobile Drug Co., 205 Ala. 214, 87 So. 159;

Haskins Trading Co. v. S. Pfeiffer Co., 14 La. App. 568, 130 So. 469.

We shall review the facts in several of these cases in some detail.

In *Kunglig Jarnvagsstyrelsen v. National City Bank*, 20 F. (2d) 307, the facts were that the parties made a contract for the sale of 150,000 tons of coal. This contract contained a provision that shipments would begin thirty days after the raising of government embargo on export coal and should be completed within six months thereafter. The contract further provided that shipments should be made at approximately 30,000 tons per month, and contained the following clause with reference to strikes and government restrictions:

"Deliveries on this contract are subject to

> strikes at the mines and on the railroads and to all government restrictions and regulations, and the c.i.f. price is to be increased or decreased as the railroad rates of freight from the mines to tidewater may be increased or decreased during the life of the contract, and is also subject to increase or decrease as the mining rate may be increased or decreased over that existing to-day."

An embargo was in fact placed upon shipments of coal and was not lifted until May 1st. Following this, certain shipments were made in June. However, in June a railroad strike occurred, and the Interstate Commerce Commission issued an order, effective June 24th, directing railroads to carry coal to tidewater only when a permit could be obtained from government officials. The effect of this order was to shut down all shipments of coal until such a permit could be obtained. This order effectively prevented shipments under the contract in question until September 17th, when the order was withdrawn. It will be seen from this statement that the six months period specified in the contract commenced May 1st and ended November 1st; that performance was had from May 1st to June 24th, when the railroad order was issued, and thereafter became impossible until after September 17th. One of the questions presented was whether the defendant was required to deliver coal at the rate of 30,000 tons a month for the period during which it was prevented from doing so. With respect thereto the court said (p. 310):

> "Under the terms of the contract, in the event of an embargo on export coal, shipments were to begin 30 days after the raising of the government

> embargo and were to be completed within 6 months. The defendant was excused from failure to deliver the 30,000 tons in each month during the embargo, and cannot be held liable for these monthly deliveries. *Delivery being ompossible during these months, it was not a matter of mere postponement or suspension of delivery during the period that performance was prevented by governmental interference.* The contract in its entirety was made subject to a *force majeure* clause, and this did not permit the defendant to deliver the balance due under the contract in the period of one or two months. They were restricted by the terms of the contract to deliver 30,000 tons per month. *Edw. Maurer Co. v. Tubeless Tire Co.* (D.C.), 272 F. 990, affirmed (C.C.A.) 285 F. 713." (Italics ours)

It should be observed in connection with this case that the clause of the contract excusing performance simply provided that "deliveries" should be subject to strikes and government restrictions, but the court nevertheless held that this permanently excused performance as to all deliveries provided by the contract to be made within the period during which the strike existed.

This conclusively demonstrates that the provision excusing "delivery" is the equivalent to a provision excusing "performance," and that such a provision does not simply defer the obligation to deliver, but completely terminates the obligation to deliver after the time expressly fixed in the contract.

In *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 256, a case arising in the Fourth Circuit, the defendant agreed to sell to the plaintiff all the

coke it could make in its ovens from January 21, 1899, to December 31st of the same year. This undertaking was subject to a strike clause providing that "deliveries herein contracted for may be suspended or partially suspended" in the event of stoppage of the works of the defendant by any strike. A strike occurred, which prevented deliveries, and the plaintiff, not having received as much coke as it contemplated, contended that the word "suspended" in the strike clause should be construed "postponed," and shipments not made within the time fixed by the contract should be made after the month of December. In denying this contention, the court said (p. 260):

> "Time may be an essential element in a contract, as in the case at bar. It is well known that coke fluctuates in price. When the contract was made it was $1.16 at the ovens. At the end of the year it was worth $2.50 in the market, and the plaintiff on December 20th declined to accept a proposition to contract for the sale of its entire output at the ovens in 1900 at $2.24 f.o.b. cars at ovens, but offered to enter into such contract at $2.75 per ton, etc. *Time is therefore of material importance in this class of contracts, both as to sales, delivery, and payments.* Other business transactions of the parties for the year were dependent on the time element of the contract. *Knowing this, the parties fixed the time within which the contract was to be operative, and to put a different construction on it would be to ignore the language of the contract itself, and the evident intention of the parties when it was made.* That plaintiff subsequently made contracts with other parties in which losses were incurred cannot affect the construction of this contract. De-

fendant possibly lost, too, by being compelled to deliver coke at $1.16, when the market price was much above that amount. There is nothing in the contract or strike clause which can reasonably be construed as extending the deliveries beyond December 31, 1899. *Where the intention of the parties to limit a contract to a certain period is manifest, it is of the essence of the contract. Carter v. Phillips* (Mass.) 10 N. E. 561; *Scarlett v. Stein*, 40 Md. 512." (Italics ours)

It is to be noted that the buyer in this case argued that the use of the word "suspended" in the strike clause indicated that only a postponement of the time of delivery was contemplated. This phraseology is certainly on its face not as favorable from the standpoint of the seller as the language involved in the contracts in the case at bar, but the court nevertheless held unqualifiedly that the obligation to perform was permanently excused rather than temporarily deferred.

The court also comments upon the importance of a fluctuating market in the industry which impels the parties, as a practical matter, to confine their commitments to reasonably short periods of time. The same practical circumstance, of course, exists in the lumber and shipping industries, particularly within recent years, during which, as every one knows, the costs and prices have been constantly rising.

In *Atlantic Steel Co. v. R. C. Campbell Coal Co.*, 262 Fed. 555, the precise question involved is excellently dealt with by the United States District Court for the Northern District of Georgia. Here the agreement of the seller was to sell 12,000 tons

of coal per year, shipment to be made at the rate of 1,000 tons per month or one car per day. The contract further provided that if the mines were unable to operate on account of strikes or other causes beyond the seller's control, the seller should not be liable "for failure to make shipments during such period." Shortly thereafter the United States entered war and the seller's mines were taken over by the Federal Fuel Administration, and performance of the contract by the seller was thereby prevented from August, 1917, to December, 1918. The contract was originally made in 1916 for a term of three years. The buyer contended that the prevention of performance by the Federal Fuel Administration for a part of the contract period did not operate to relieve the seller from any part of its obligation. The seller, on the other hand, contended, as the appellee in this case contends, that it was obligated to make only such deliveries as under the terms of the contract were to be made after the impediment to performance was removed, and that it was permanently excused from the obligation to make any of the deliveries called for by the contract during the period when the Federal Fuel Administration controlled the mines. In sustaining the defendant's position, the court said (pp. 560, 561):

> "That the defendant in this case, when called upon to surrender the use and control of its property to the public need, should thereby become liable to damages for failure to perform a civil obligation, is unthinkable. That its performance should be only temporarily excused would be less harsh, and, if time were not of the essence of the contract, it might be thought that no hardship

would result in a mere postponement. To apply the rule of postponement, however, to the many contracts that were indefinitely arrested by government action, both in coal mines and manufacturing establishments, during the war, would perhaps result in an accumulation of obligations to make deliveries or to receive and pay for goods that would be ruinous to the persons involved. It would seem to be a much more practical rule to establish that, when the performance became due, whether time was strictly of the essence or not, if performance could not be made because of government action then forbidding, and duration of which obstacle was indefinite and unascertainable, the obligation was thereby canceled and the contract discharged, and that the parties should each be at liberty and under the duty to save themselves as best they might by other contracts and arrangements. This, in principle, seems to be settled by the rulings as to embargoes on ships releasing their owners from their contracts to carry, in the cases of *Allanwilde Transport Corporation v. Vacuum Oil Co.*, 248 U. S. 377, 39 Sup. Ct. 147, 63 L. ed. 312, and *Standard Varnish Works v. Steamship Bris*, 248 U. S. 392, 39 Sup. Ct. 150, 63 L. ed. 321. And see *L. & N. R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 66 L. ed. 297, 34 L. R. A. (N.S.) 671.

"The same conclusion may fairly be reached by a consideration of the contract that these parties actually made. While the occurrence of the exact conditions that did arise was, of course, not anticipated by them, still the contract provided:

" 'If the mines from which this coal is to be shipped are unable to operate by reason of min-

ing troubles, or on account of other causes beyond their immediate control, the first party is not to be liable for failure to make shipments during said period.'

"While in a certain sense the mines did operate they did not operate under the control of the defendant, nor was it able to avail itself of their operation in the discharge of its contracts. It may fairly be said that within the meaning of these parties, on account of causes beyond defendant's control, it could not operate its mine for the purpose of meeting the shipments due during the period of federal control, and that the stipulation that it should not be liable for the failure to make shipments is to be applied. In either view the defendant ought not to be liable for defaults during such period."

And later, to the same effect (pp. 561, 562):

"The simplest and best rule, and the one most consonant with good policy, is that suggested first above, that the action of the government, in so far as it directly interfered with and prevented the fulfillment of contracts, should be considered as a final discharge from their obligation."

In *Edward Maurer Co. v. Tubeless Tire Co.*, 285 Fed. 713, (a decision of the Circuit Court of Appeals for the Sixth Circuit), contracts for the sale of rubber were made subject to all rules and regulations imposed by the United States government. Certain restrictions were imposed by the government during war time. The seller sought to hold the buyer liable for refusal to take goods contracted for after the government restrictions were removed. The court held that the effect of the clause was not merely to

postpone performance, but to excuse the obligation of both parties permanently. In its opinion the court especially emphasizes the point that no sane business man would unqualifiedly commit himself to the performance of a contract for the sale of a commodity at some wholly uncertain time in the future contingent upon such an extrinsic circumstance as the conclusion of a war.

The decision in *Edward Maurer Co. v. Tubeless Tire Co., supra,* was specifically followed by the same court (that is, the Circuit Court of Appeals for the Sixth Circuit) more recently in *Indiana Flooring Co. v. Grand Rapids Trust Co.*, 20 F. (2d) 63.

We have grouped the foregoing cases for the reason that they are all decisions of Federal courts.

Turning to the decisions of the state courts, we first consider the case of *Normandie Shirt Co. v. J. H. & C. K. Eagle*, 238 N. Y. 218, 144 N. E. 507. In that case a very short contract was made for the sale of shirting. Among other things, it provided: "Delivery June-July-Aug.-Sept." This contract was on an order form, and on the reverse side appeared the following clause:

> "2—Fire, war, strikes, legislative, judicial or public administrative acts, errors, or defaults of the seller's mill, manufacturer, dyer, finisher, carrier, or vendor, or any cause not within the seller's control, preventing the delivery of merchandise in accordance with the terms of this contract, shall absolve the seller from any liability hereunder."

In order to demonstrate how identical the provisions of this clause are with those in the contracts

now before this court, let us set the two provisions side by side. Stripping both of their surplus language, the *force majeure* clause in the *Normandie Shirt Co.* case reads as follows:

> "* * * strikes * * * preventing the delivery of merchandise in accordance with the terms of this contract shall absolve the seller from any liability hereunder."

While in the case now before this court the clause is:

> "* * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes, lockouts or labor disturbances * * *."

This comparison reveals that both clauses simply provide that the seller shall not be liable for failure to make deliveries according to the contract.

The following excellent discussion by the New York Court of Appeals covers the question more adequately than could a paraphrase thereof by the author of this brief.

> "Deliveries were prevented by a strike, as has been conceded. Did this justify the defendant in terminating the contract, or were deliveries postponed to a reasonable time after September 30th? It must be noted that in this clause we find no statement that deliveries may be made later. It is confined to liability. It is assumed that the deliveries are to be made during June, July, August, and September. If the defendant failed to make these deliveries, it would be liable, but for this clause of its contract. For a failure to make deliveries, due to strike it is not to be liable at all. It shall be absolved from 'any liability hereunder'—not merely liability for delay, but from

any liability which would include failure to deliver at all. These strike clauses appear in mercantile contracts in various language, and have been the subject of litigation in numerous cases. Out of them has developed a general rule or principle of law. It is this:

"When deliveries according to contract have been prevented, by strikes of a substantial nature, or other like excepted causes, the party is relieved altogether, not only from liability for failure to make such deliveries, but also from the obligation to make them thereafter. As to the installments not delivered according to contract, the contract is terminated. Whether this termination would extend to separable installments falling due after the strike, which it would then be within the capacity of the seller to deliver within the contract term, we do not need to consider. At least as to the installments falling due within the period of disability, the obligation would be ended. As to such installments, if it be the intention of the parties that the strike clause is merely to delay delivery, so that goods which could not be made or delivered because of a strike must be subsequently made or delivered within a reasonable time thereafter, the contract must clearly so provide. *Delaware, Lackawanna & W. R. R. Co. v. Bowns*, 58 N. Y. 573; *General Commercial Co., Ltd., v. Butterworth-Judson*, 198 App. Div. 799, 191 N. Y. Supp. 64; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 265, 51 C.C.A. 213.

"The cases referred to by the respondent will be found to have clauses in the contracts involved clearly indicating that delivery was to be delayed, and made up subsequently to the termina-

> tion of the cause of delay. We conclude, therefore, that this clause entitled the defendant to terminate this contract on September 30th, and to refuse to deliver any goods thereunder of which delivery had been prevented by strikes. In other words, it could not deliver by September 30th the goods which the plaintiff had ordered, by reason of the strike. The contract as to these undeliverable goods was therefore at an end, and the defendant was not obliged to make them up and to deliver them later. This clause did not call for a later or postponed delivery." (pp. 510, 511)

In *Black & Yates v. Negros-Philippine Lumber Co.*, 32 Wyo. 248, 231 Pac. 398, the contract was one for the sale of a large amount of lumber which the seller agreed to deliver to New York "as soon thereafter as it should become possible to secure transportation therefor by vessel from the Philippine Islands to New York City." This contract was made in February, 1916, and the buyer some years later brought suit for approximately $200,000, alleging that it became possible to secure such transportation on or about January 1, 1919. The defendant contended that although no specific time for performance was fixed in the contract, a reasonable time was implied, and that performance having been impossible for more than a reasonable time, because of the impediment caused by lack of shipping facilities during war time, the defendant should no longer be obligated to deliver the lumber. The plaintiff's position, of course, was that the defendant was obligated to deliver within a reasonable time after the impediment was removed. In

sustaining the position of the defendant seller, the court held:

> "It is held that when deliveries according to contract have been prevented by the operation of a casualty clause contained therein, such as that of fire, strike, or other unavoidable contingency, the promisor is relieved altogether, not only from liability for failure to make such deliveries, but also from the obligation to make them thereafter, unless, probably, only a delay of short duration is caused thereby, or unless the contrary appears from the contract. *Normandie Shirt Co. v. J. H. & C. K. Eagle, Inc.*, 238 N. Y. 218, 144 N. E. 507, and cases cited; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 256, 51 C.C.A. 213; *Edward Maurer Co. v. Tubeless Tire Co.* (D.C.) 272 Fed. 990, affirmed in (C.C.A.) 285 Fed. 713, and cases there cited. Williston on Contracts, §1968, and cases cited; *Jackson v. Marine Ins. Co.*, 10 L. R. 125 (1874). And it is further held that if it be the intention of the parties that the operation of the casualty clause is merely to delay delivery, requiring such delivery to be made subsequent to the unavoidable casualty, or within a reasonable time thereafter, the contract must clearly so provide. *Edward Maurer Co. v. Tubeless Tire Co., supra; Normandie Shirt Co. v. J. H. & C. K. Eagle, Inc., supra.*"

And further:

> "The question of course still remains whether that excuse was intended to be permanent or temporary. But the same question arises in interpreting any casualty clause whatever, and in any event—and that is as far as we need to decide—the rule that courts are not inclined to con-

> strue such clause as intended to give a temporary excuse only, unless that clearly appears, would seem to be applicable here, for the reasons upon which that rule is founded operate as strongly in the case at bar as in the cases cited."

It will thus be seen that this court, like the New York court, takes the unqualified position that an excuse extending over the contract period is a permanent one, and that if it be the intention of the parties that such excuse is not to be permanent, they must clearly provide to the contrary in their contract.

In *Ladd Lime & Stone Co. v. MacDougald Const. Co.*, 29 Ga. App. 116, 114 S. E. 75, the contract for the sale of crushed stone provided that shipments should begin with the month of July and continue at a daily rate not to exceed eight cars a day, and that the contract should expire by its own limitations on January 31, 1920. This contract was made on June 30, 1919. The contract further provided that "sellers shall not be held responsible for delays caused by strikes, accidents, or causes beyond their control." It will be noted that the strike clause purported to excuse delay only, but that the contract by its terms expired "by its own limitations on January 31, 1920." The seller did not deliver all the stone called for by the contract because prevented during the contract period from so doing by strikes. In holding that the seller was not obligated to make this delivery subsequently, the court said:

> "It is not unthinkable to contemplate the possibility of a contract providing for contingencies which would not only operate to delay the purchaser's right to call for delivery, but would op-

> erate to destroy his right to demand delivery at any time and rescind the actual purchase of any undelivered stone. It is conceivable that the seller, on account of the advance in market prices, would be unwilling to bind himself to deliver after a fixed date, although he might be willing to bind himself to deliver before such date. It is conceivable that the purchaser was satisfied with the price and other provisions in his favor, and that he was willing to contract to relinquish his rights under the contract upon certain contingencies (as an expiration of the contract on a certain date) favorable to the defendant. The defendant's construction of the contract was reasonable and plausible. We therefore conclude that the seller could successfully defend upon the ground that he had not violated the contract during its life, provided the delay in delivery was caused by such circumstances as were beyond the seller's control and as would, under the terms of the contract, excuse delay while such circumstances existed."

In *General Commercial Co. v. Butterworth-Judson Corp.*, 191 N.Y.S. 64, the contract was made for shipment of goods in July or August at seller's option, provided that the contract was contingent upon strikes or other causes beyond seller's control. The seller did not ship during July or August, because of a strike, and later sought to hold the buyer to the obligation of accepting the goods. The court, after a complete discussion, held that the buyer was permanently excused.

We believe it unnecessary to further extend the analysis of the authorities cited. The other cases are all based upon the same principles, and some of them,

especially *Metropolitan Coal Co. v. Billings, supra*, 202 Mass. 457, 89 N. E. 115, contain very good discussions of the point under consideration. In the last analysis all of these authorities sustain the following propositions determinative of the question here involved. These propositions are:

1. Time is of the essence of a mercantile sales contract, even though the contract does not specifically so state.

2. If in such contracts there is a *force majeure* clause which comes into operation and excuses performance during the specific period fixed therefor by the contract, such excuse is permanent and not temporary.

Furthermore, several of the cases, as will be noted from an examination of the quoted portions thereof, point out with great emphasis that if the parties contemplate that the excuse shall be temporary in character only, then their contract must clearly so provide. In other words, in the absence of any provision clearly establishing excuse as a temporary rather than a permanent one, it must be held that the parties intended the excuse to be of a permanent character.

The obvious reason behind these rules lies in the fact that parties to mercantile sales contracts necessarily anticipate at the time they enter into the agreement that it is of the utmost importance that the commitment be performed only during the time specified, since otherwise the fluctuations which are repeatedly in process in commodity prices and shipping rates would necessarily render the transaction hazardous or injurious to one party or the other. By limit-

ing the obligation performed to a specific period this practical uncertainty which is so undesirable in the commercial world is reduced to a minimum and held in line with the actual intention of the parties at the time the contract was made.

Throughout the entire course of this litigation we have conceded that there is a minority rule contrary to that announced by the foregoing authorities. The minority cases, of which the following are the best examples, are cited in the appellant's brief:

Fish v. Hamilton (C.C.A. 2) 112 Fed. 742;

Jackson Phosphate Co. v. Carleigh Phosphate & Fertilizer Works (C.C.A. 4) 213 Fed. 743;

Acme Mfg. Co. v. Arminus Chemical Co. (C.C.A. 4) 264 Fed. 27.

Fish v. Hamilton, supra, in which the court rendered a very brief opinion, is a decision of the Circuit Court of Appeals for the Second Circuit antedating *Kunglig Jarnvagsstyrelsen v. National City Bank,* 20 F. (2d) 307, a recent decision of the same court. The two as applied to the present question are indistinguishable, and *Fish v. Hamilton, supra,* must of necessity be regarded as overruled by implication. The *Jackson Phosphate Company* case, *supra,* and the *Acme Mfg. Co.* case, *supra,* both from the Fourth Circuit, entirely ignore *Hull Coal & Coke Co. v. Empire Coal & Coke Co.,* 113 Fed. 256, an earlier decision of the same court, which is in irreconcilable conflict with the two later cases. Although these two decisions possibly announce the Fourth Circuit rule, we submit that an examination of all three opinions from that

circuit will disclose that a much more careful and thorough examination was made of the entire question in the *Hull Coal & Coke Co.* case, which announces the majority rule.

The appellant in its brief cites only those authorities announcing the minority rule and completely ignores the cases cited by the appellee and followed by the District Court in its written opinion.

But even if there were room for doubt under the authorities, such doubt would in the present case be completely eliminated by one highly important and significant provision in the contracts. Each of the contracts contain the following clause:

> "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days."

The "aforementioned causes" referred to are the various contingencies mentioned in the *force majeure* clause.

This clause in the contracts shows beyond all doubt that the parties clearly understood that without such a provision the seller would not be bound to deliver and the buyer would not be bound to accept delivery after the dates specified therefor in the contracts. In other words, the parties knew that time was of the essence, and agreed to qualify this situation only to the extent of according the seller an option to make delivery for a limited additional period. By making the matter optional with the seller, the parties emphasized the fact that no obligation to perform vested upon the

seller. Obviously, if the seller were bound to perform after the strike, as appellant asserts, the clause above quoted, making performance optional with the seller, would be wholly meaningless.

None of the arguments advanced by the appellant as to the legal effect of the *force majeure* clause of the contracts is apt.

Apparently recognizing that its authorities are in the minority, appellant has advanced certain wholly unrelated contentions to support its position. Among these contentions are the following:

1. Impossibility of performance of a contract does not excuse the promissor.

2. A provision in the contracts for cancellation in the event of war is said to have some bearing upon the strike clause.

3. The clause in the contract giving the seller the right to make delivery for a period of thirty days after the period specified in the contract is sought to be invoked as a provision for the benefit of the buyer.

Looking to the first of these contentions, we admit that is is a well recognized rule of the law of contracts that mere impossibility of performance does not excuse the promissor from the duty of performing; *but this rule is subject to the definite qualification, wholly ignored by the appellant, that the contract may provide against the contingency of impossibility, and where such provision has been made, performance will be excused if the condition specified as an excuse occurs and in fact prevents performance.* In the in-

stant case, the general rule is obviously rendered inapplicable by the presence of the *force majeure* clause.

Appellant's next contention arises from the clause in the contract, which states:

> "In the event of war affecting this contract, the seller has the right of cancellation * * *."

Appellant argues that this clause shows the appellee had no right to cancel the contracts for other causes. There are two final answers to this contention. First, this provision is an entirely separate one from the strike clause, and has no bearing whatsoever on the latter. Second, the appellee is not asserting any right to a technical cancellation of the contract, as it might in the case of war, but rather simply asserts that the law has permanently excused performance. The appellee concedes that it had no right at once to cancel the contract immediately upon the occurrence of the strike. The two provisions are different in nature, in no sense inconsistent, and have well recognized, definitely established meanings in the law, and neither has the slightest bearing upon the legal effect of the other.

Appellant's next contention runs to the clause which provides that "buyers agree to accept delayed shipment and/or delivery when occasioned by the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days." We have never been able to understand how the appellant, as buyer, could take the view that this clause could be invoked to aid the position of the appellant. The clause manifestly recognizes that at the termination of the time fixed for delivery, if delivery had been

prevented by any of the causes mentioned in the *force majeure* clause, the buyer would be under no responsibility to take delivery, and that the seller would be under no responsibility to make delivery. The sole and very apparent purpose of the clause was to give the *seller* greater rights than it would otherwise have, that is, the optional right to compel the buyer to take the goods for a period of thirty days after the removal of the impediment. This right, being optional with the seller, obviously imposed no obligation on it. Rather it definitely confirms the seller's primary contention, that is, the time was of the essence of the contracts, and that both parties would be relieved from all obligation to perform, if performance was rendered impossible by any of the specified causes during the time initially agreed upon.

In addition to these contentions, the appellant also raises one or two other points of even less consequence; but to complete the argument, we shall comment thereon.

On page 23 of its brief, appellant suggests that there was only a nominal increase after the strike, amounting to 87½ cents a thousand, board feet. This contention is manifestly incorrect. The figure quoted is taken from a letter introduced in evidence as a part of Plaintiff's Exhibit 11, this particular letter appearing in the transcript, on page 61. This letter related to a shipment which was made after the strike, and refers only to a price on this particular shipment, in accordance with an agreement between shippers and certain carriers on "certain pre-strike freight contracts."

As a matter of law, the extent of the increase of freight rates after the strike is of no consequence whatsoever, since the rights of the parties are fixed by the terms of the contracts and not by the extent of the damage which might occur to either party. For this reason, neither side went into the question of variation of freight rates at the trial. However, for what it may be worth and to clarify the picture somewhat, appellant's written statement of its damages (Tr. 79 to 81) shows a freight rate of $20 a thousand upon the various shipments which the appellant made after the strike and which it is agreed constituted the lowest freight obtainable at that time. This price for freight alone was many dollars in excess of the combined freight and purchase price of the logs under the terms of the contract antedating the strike. The statement in appellant's brief, that the rate increase was only 87½ cents a thousand was incorrect and misleading.

Finally, appellant seeks to invoke an estoppel upon the ground that the appellee failed to advise it in advance of the termination of the strike that it would not make the shipments after the strike ended. It is axiomatic that an estoppel must be pleaded before it can be asserted, and no such contention is suggested in the pleadings of the appellant in this case. Likewise, no facts were proved to establish an estoppel. One of the essential elements of an equitable estoppel which is that the party asserting the estoppel relied upon the conduct of the other party, to its damage. In the instant case there is not the slightest showing or suggestion that the position of the appellant was

prejudiced in the slightest particular by reason of the failure of the appellee to inform appellant during the strike that the appellee would not be legally liable to perform after the strike ended.

We feel that we have given far more dignity to these arguments of appellant than they warrant. Independent of the question of custom or usage which we shall presently discuss, this case turns simply upon the determination of the legal effect of the *force majeure* clauses in the contract, and that question has been so often passed upon by the courts upon states of fact virtually identical with those in the case at bar as to render any indirect approach to the subject both unnecessary and improper.

The legal position of the parties is not affected by any trade custom.

The appellant asserts that despite the language of the contracts and the definite interpretation given thereto by the courts, its construction of the contracts is nevertheless sustained by a trade custom. The appellee contends, first, that as a matter of law no such custom can be proved to alter the clearly established meaning of the contracts, and, second, that as a matter of fact the appellant's evidence upon this point was insufficient to establish the existence of any such custom.

Evidence of trade custom cannot properly be introduced to vary the terms of the contracts.

The general rule as to proof of trade custom is stated in 17 Corpus Juris, page 508, as follows:

"Where the terms of an express contract are

> clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is written or verbal."

And in *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534, the court in quoting from the case of *Simmons v. Law*, 3 Keyes (42 N.Y.) 217, says:

> " 'A clear, certain and distinctive contract is not subject to modification by proof of custom. Such a contract disposes of all customs and practices by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined.' *Barnard v. Kellogg*, 10 Wall. 383; *Boon v. Steamboat Belfast*, 40 Ala. 184."

And the Washington Supreme Court continues by saying:

> "It is only where a contract is silent in some particular or is ambiguous that proof of custom is admissible, and such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it."

In this connection, it should be remembered that the contracts expressly provide that they shall be governed by the law of the State of Washington.

The same rule has been consistently followed by the Supreme Court of Washington in line with the uniform law on the subject as recently as the case of *North Pacific Finance Corporation v. Howell-Thompson Motor Company*, 162 Wash. 387, 2 P. (2d) 684.

Also the rule has been followed by the Circuit Court of Appeals for the 9th Circuit in *Hecht v. Alfaro*, 10 F. (2d) 464.

The appellant, without questioning these principles,

apparently contends either that the contract is ambiguous or that the custom offered is not in conflict with the terms of the contract. We submit that the contracts are not ambiguous. To begin with, they call for shipment in certain months designated therein. They are mercantile contracts and consequently the time specified for performance is, as a matter of law, essential. They contain *force majeure* clauses excusing the seller from performance if prevented by any of the specified uncontrollable causes. Under these circumstances the overwhelming majority of judicial decisions establish the proposition that the excuse is not temporary but is permanent. In other words, that neither party is obligated to perform if the contingencies mentioned in the *force majeure* clause extend over the period fixed by the contract for performance.

If it might be assumed for the sake of argument only that the contracts might be uncertain or incomplete as an original proposition, the fact remains that the judicial interpretation of such contracts as established by the authorities cited by the appellee has established absolute certainty as to a meaning and effect to be given to the contracts here involved. In addition, the contracts in this case go further by the inclusion of the provision making it optional with the seller to hold the buyer for a period of 30 days after the impediment is removed. The contracts clearly show that it was the understanding of the parties that except for the rights conferred upon the seller by that provision, the contract was at an end on both sides. Taking all these factors together, absolute cer-

tainty and completeness exists both as a matter of fact and of law as to the meaning and effect of the contracts.

Both parties were, of course, bound to know the law which gave the contracts a clear and definite meaning. In this respect the case is precisely analogous to the endorsement upon a negotiable instrument such as a note or bank check. Looking at such an instrument standing by itself and without any knowledge whatsoever as to the law respecting the instrument, anyone would say that the relation of the endorser to the instrument was ambiguous. By simply appending an endorsement to such an instrument the endorser has not used any words in which it may be said that he has subjected himself to an obligation. The law, however, in such a case has long since established the meaning and consequences to be attached to the bare signature of the endorser. As a matter of law, by simply signing the instrument, the endorser guarantees that it will be paid by the party primarily liable. He also makes a number of other specific warranties such as those relating to his title and right to endorse and as to the genuineness of the instrument. No one would for a moment contend that it would be possible to introduce evidence that it was the custom and usage in a particular locality or in a particular trade that such an endorsement would subject the endorser to no obligation whatsoever, and yet that is precisely the nature of the contention advanced by the plaintiff in this case. We repeat that the contracts here involved are in all respects certain and there is no room for interpretation by parol evidence

when the law has already supplied the proper interpretation to be given to the contracts.

As a matter of fact, when accurately considered, the effort of the plaintiff here is not an effort to interpret any ambiguity in the contract; it is rather an effort to show that the contract has legal consequences which are precisely the opposite to those which the courts have said that contracts have. The law says that if performance of such contracts is prevented during the time specified by performance by the existence of one of the contingencies mentioned, then both parties are released. The contracts here involved qualify that rule specifically, providing that the seller for a limited period of thirty days shall have the option of holding the buyer. The custom here asserted is that the buyer is under such circumstances the only party released and it is said the custom gives to the buyer the option of holding the seller not for any specifically limited period, but for a reasonable time after the removal of the impediment to performance. This is not only contrary to every canon of construction which can be applied to this contract, but in fact goes far beyond the rule announced in the minority group of cases relied upon by the plaintiff to support its original proposition in this case. The most those cases assert is that both parties to the contract will be obligated to proceed with performance for a reasonable period after the strike has ceased. It is nowhere suggested that in the absence of a contractual provision to that effect the law places the buyer in the favored position of having the option to proceed with the transaction or not. Practically stated, this rule means that the

buyer would proceed if it were profitable to him to do so and would decline to proceed if it were unprofitable to do so, while the seller would have no corresponding option. It seems to us manifest that even though it be conceded for the sake of argument that custom might be proved for the purpose of effecting an interpretation of language, nevertheless it is impossible to admit evidence of custom which would result in holding that the contract had a legal effect diametrically opposite to that which the law gives to it.

Assuming for the sake of argument that the custom asserted by the appellant is properly provable, the evidence introduced at the trial is insufficient both in fact and in law to establish the existence of the custom.

The District Court found as a fact that no trade custom of the character asserted by appellant existed. This finding based upon conflicting evidence, should not be disturbed on appeal. *Woey Ho v. United States* (C.C.A. 9) 109 Fed. 888; *Pabst Brewing Company v. E. Clemens Horst Co.* (C.C.A. 9) 264 Fed. 909.

In *Washington Brick, Lime & Sewer Pipe Company v. Anderson*, 176 Wash. 416, 29 P. (2d) 690, the Supreme Court of the State of Washington, speaking through Judge Steinert, had the following to say about the nature and quantity of proof required to establish custom or usage:

> "To establish a custom tacitly attending the obligations of a contract, it must be shown to be uniformly prevalent and universally observed,

so that it may be said that the contracting parties either had such custom in mind or else must be presumed to have had it in mind, and consequently to have contracted with reference to it. Furthermore, the evidence to establish custom must be clear and convincing, free from ambiguity, uncertainty or variability. It must be positively established as a fact, and not left to be drawn as an inference from isolated transactions. *Jarecki Mfg. Co. v. Merriam*, 104 Kan. 646, 180 Pac. 224; *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. 771; *Scudder v. Bradbury*, 106 Mass. 422; *Continental Coal Co. v. Birdsall*, 108 Fed. 882; 4 Wigmore on Evidence, §1954; 27 R. C. L. 197.

"Our decisions, in so far as they touch upon the subject, are in line with these rules. *Johns v. Jaycox*, 67 Wash. 403, 121 Pac. 854, Ann. Cas. 1913D, 471, 39 L. R. A. (N.S.) 1151; *Wilkins v. Kessinger*, 90 Wash. 447, 156 Pac. 389."

Briefly digested, this quotation establishes that a custom must be uniformly prevalent and universally observed and must be proved by clear and convincing evidence free from ambiguity, uncertainty or variability. We shall demonstrate the evidence in this case does not meet these requirements.

The appellant sought to prove the existence of the custom by five witnesses. Of these, Mr. Dant and Mr. Darling are the President and Vice President, respectively, of the appellant corporation. The other three witnesses may be said to be disinterested. On behalf of the appellee, the testimony of Mr. Herber, its manager, and Mr. Young, its auditor, was offered, and these witnesses categorically denied the existence

of any custom. We shall examine the testimony of the appellant's witnesses separately.

The first witness was Mr. Penketh, presently export manager for the Fairhurst Lumber Company of Tacoma. On direct examination, speaking of the custom in connection with the clause appearing in the defendant's contract, he said:

> "The general custom in my experience has been and is that any delays caused by these various exceptions that are recognized as requiring protection is only a delay as long as that cause lasts; and that after that cause has been overcome, the contract has been usually considered as being—having to be completed, and has been completed as a general practice." (Tr. 88)

The statement of this witness is simply that the contract has been *usually* considered as having to be completed, and has been completed as a general practice. This testimony, given on direct examination, therefore falls far short of showing a uniformly prevalent and universally observed custom. It only shows a usual and not a wholly uniform practice. On cross examination Mr. Penketh testified that he did not know how long he had been familiar with the clause contained in the appellee's contracts, but did recall that he had seen the clause some time this year, but stated that he did not know any custom in the trade with reference to this particular clause since he had seen it this year.

The next witness, Mr. Darling, is, as already pointed out, Vice President of the appellant company, and consequently an interested witness. His statement as

to the nature of the custom in so far as given on direct examination was:

> "The custom is that as soon as the causes for this delay are removed, the shipment must be made." (Tr. 105)

And in answer to the question as to how long a time might be allowed under the contract for performance after the impediment to performance had ceased, he stated:

> "It would depend entirely upon the quantity involved and the conditions that prevailed after the strike or other impediment had been removed." (Tr. 106)

Testimony of this character falls far short of meeting the requirements of certainty and unvariability required under the principles announced in *Washington Brick, Lime & Sewer Pipe Co. v. Anderson*, 176 Wash. 416, 29 P. (2d) 690, *supra.*

On cross examination the same witness testified that with the exception of the two longshore strikes in 1934 and 1936-1937, he was not aware of any instance where delivery was ever made under the contract form involved in this case, and he further admitted that when he said that he believed there was a custom with reference to the particular clause in the appellee's contracts he was simply giving his opinion on the subject; that he had given the clause considerable study and based his statements upon that study. He further testified unqualifiedly that the custom did not subject the buyer to any obligation to take the goods after the specific period fixed in the contract had expired.

The next witness was Mr. Haig, General Manager

of Pacific Coast Spruce Corporation. He described the custom as follows:

> "Well, the custom has been to make delivery of the goods contracted for after the period that was named in the contract, if a strike or other unforseen circumstance occurred that prohibited the seller from making delivery in the time specified." (Tr. 111)

And in answer to the inquiry as to the length of time for performance under the custom he stated:

> "Well, there has been a custom of thirty days, but it has often been extended by mutual agreement between the buyer and the seller." (Tr. 112)

He further stated that the continuance of the impediment might possibly affect the custom. Not only is the nature of the custom made indefinite by the last statement, but it must also be observed that the custom described is simply one to make delivery of the goods and it is not stated that there is any custom requiring delivery to be made. We emphasize this point, because we do not question that it may have been the practice of various concerns in the past to make delivery after the strike for purposes of policy or because it still remained profitable to do so. Such a practice does not establish any custom of the kind here relied upon by the appellant. Rather, the appellant must show not simply that the thing is done but that by custom the party is regarded as being absolutely obligated to make delivery.

On cross examination Mr. Haig admitted that he had not seen the appellee's contracts before the day of the trial and that he knew of no instance in which

any custom had been followed under those contracts or any contract of the defendant having the same clause in it.

On redirect examination he simply reaffirmed his earlier testimony in the following language:

> "The contracts were filled after the strike, after strike was over, were filled in a reasonable time." (Tr. 121)

On recross examination, this witness became very evasive when interrogated as to whether the buyer was required after the cessation of the strike to accept the goods. He finally testified that the custom requires the buyer to accept the goods. He admitted, however, that the uniform practice was for the seller to call up the buyer after the contract period had expired and then make a new agreement for shipment after the contract period (Tr. 124 to 127).

The latter part of this witness's testimony on recross examination not only shows that he entertained a vague and different notion from that given by Mr. Dant and Mr. Darling, the officers of the appellant, in that both of those witnesses positively state that the custom imposes no obligation on the buyer, whereas Mr. Haig originally seemed to think that it did bind the buyer as well as the seller, but that in the last analysis Mr. Haig admitted that a new agreement was made in each instance where the contract period had expired. In view of the testimony appearing in this portion of the record, we submit that Mr. Haig's testimony cannot be accorded any weight or validity toward establishing a uniformly prevalent and universally observed custom, which the law re-

quires to be established by clear and convincing evidence which is free from ambiguity, uncertainty or variability, these being the requirements specified by the Washington Supreme Court in the case already cited.

The next witness offered by the appellant was Mr. Force, president and general manager of the Douglas Fir Export Company. Although produced as witness for the appellant, his testimony, instead of being favorable to the appellant, consisted of a refusal to state that there is any custom. He stated:

> "I would not want to say that there is a recognized custom. I know what we do." (Tr. 130)

And at the conclusion of cross examination, he testified that he was not aware of any custom with reference to the performance of the contract of the appellee (Tr. 132).

The final witness for the appellant was Mr. Dant, whom we have already mentioned as the President of the appellant corporation. His testimony as to custom is:

> "Well, there is a general custom on the Pacific Coast and all over the world that in the case of strikes or other impediments which delay a shipment, that that shipment will be made within a reasonable length of time after those difficulties are removed." (Tr. 134)

And, again, he testified to the same effect:

> "Well, that custom would be to ship within a reasonable length of time, as soon as possible within a reasonable length of time."
>
> "Q And is there any measure as to any rea-

sonableness of that time which is generally understood in the trade?

"A It depends on conditions. It might be that space would be available immediately, or it might be a month or two months or three months; and I would say that we have sometimes had much longer than that." (Tr. 136)

On cross examination he stated, page 82, that the buyer did not have to take the goods after the strike had ceased, but that he was accorded an option which did not exist in favor of the seller.

Taking the testimony of these witnesses as a whole, it appears that two of them, Mr. Dant and Mr. Darling, are interested as officers of the appellant; that they testified to a custom that the shipment will be made within a reasonable length of time after the impediment ceases, but that the buyer is not bound to this custom at all.

It should be remarked that the existence of such a custom is denied by two interested witnesses called by the appellee (Tr. 150, 185). Looking to the testimony of the three disinterested witnesses, it at once appears that no one of them agrees with any of the other witnesses for the appellant as to the nature and extent of the custom, and that one of them, Mr. Force, refuses to testify that there is any custom. Mr. Penketh says that it is usually considered as having to be completed, but does not say that there is any custom making it obligatory that the seller make delivery. Mr. Haig says that custom "has been to make delivery" after the strike and that it is a custom to do so for thirty days, which is often extended by mutual agreement between the buyer and the seller. This

is a thought which none of the other witnesses suggest in connection with the custom. As an original proposition he denied in cross examination that custom was not binding on a buyer, but finally admitted that in any case a new agreement was made between the parties after the expiration of the period fixed by the contract. Mr. Force, as we have already observed, declined to testify to the existence of any custom.

Taken together, the testimony of these witnesses shows that there is no custom imposing any legal obligation on the seller to deliver after expiration of the specific time fixed for delivery. Rather than proving the existence of any uniform and universally observed custom within the rule of the *Washington Brick & Lime Case, supra,* 176 Wash. 416 (page 23 of this brief), the testimony shows complete confusion upon that subject. The proof is replete with uncertainty and variability, which, as a matter of law will necessarily negative rather than establish the existence of the custom. The only possible conclusion is that several of the witnesses have in mind the fact that within their experience some contracts have been performed after the contingencies specified in the *force majeure* clause have ended. And it must not be overlooked that the custom attempted to be proved by the appellant was an amazing one—one not creating a mutual obligation—one whereby the seller was bound but not the buyer.

As Mr. Haig remarks, it is generally proved in those cases that the buyer wants to take the goods, and it is no doubt equally true that in many cases the

seller wants to sell the goods. Where neither the cost of the goods nor the other expenses of performance are different from what they were at the time fixed by the contracts for performance, then both of the parties would be quite willing to go through with the deal to their mutual profit. Likewise there may be many instances in which either or both of the parties go through with their commitments simply as a matter of business policy, even though it may be unprofitable to do so. However, performance for any such practical reason does not establish a custom, since it is attributable entirely to other causes.

In conclusion upon this point, may we call to the court's attention the fact that not one of the witnesses testifies to a specific instance in which in his experience the matter of custom has been squarely made the basis for requiring performance. Furthermore, the correspondence introduced in evidence, although very extensive, does not contain the slightest intimation that the appellant is asserting the existence of a custom or relying upon it. There is not a shred of testimony in the record indicating that the subject of custom affecting the contract was ever mentioned in any discussion between the parties anterior to the institution of this suit. As a matter of actual fact, the issue of custom was first called to the attention of the appellee by the reply made by the appellant to the affirmative defenses; This reply having been filed after this court sustained the demurrer requiring the validity of appellant's contentions based strictly upon the terms of the contract.

The trial court rightly refused to admit evidence of trade custom or usage under contracts other than those involved in the case at bar.

Appellant makes, but does not argue at any length, the point that the trial court erred in excluding certain testimony as to custom. The nature of the testimony excluded is clearly shown by appellant's offer of proof (Tr. 107), by which appellant proposed to show "what the general custom is as to * * * clauses of similar import and tenor generally used in contracts throughout the trade." The so-called "clauses of similar import and tenor" were not produced by appellant; consequently their similarity could could not be judged by the court or challenged by counsel for the appellee.

Of course, if appellee's contention that no evidence of custom or usage is admissible to vary the terms of the contracts is correct, that principle alone renders consideration of the present question unnecessary. But even if it be assumed, for the sake of argument only, that, as a broad general proposition, evidence of custom or usage could be introduced, nevertheless, the trial court was obviously right in refusing to admit testimony of the character above mentioned.

Appellant cites no authorities sustaining its position. Independent of any authority, however, the vice of appellant's contention is readily demonstrable.

The issue presented is: Does a trade custom exist which attaches consequences to a specific contractual provision diametrically opposite to the consequences attached thereto by the courts in the absence of any such custom?

In order to establish a trade custom or usage of this character, it must of necessity be shown that the custom or usage relied upon is one applicable to the specific language of the contract involved. Evidence showing a custom or usage with respect to a contract containing "similar" language certainly is not enough, especially where the witness is to be the conclusive judge as to the extent of the similarity.

If appellant's views are adopted, a witness can say: "True, I know of no custom and usage affecting a contract containing the language now before the court. However, I know of a custom and usage on similar contracts. I am unprepared to demonstrate the similarity, so that any one other than myself can judge whether or not distinguishing factors exist. Nevertheless, you must accept my judgment that the custom, concerning which I am about to testify, applies to the contract which we are considering in this proceeding."

This court is called upon to pass upon a specific group of contracts. It is thoroughly familiar with the fact that courts repeatedly must distinguish between different contracts of the same general type, because of detailed differences of language. There would be no point in aspiring to any mode of correct expression in drafting contracts, if the effect of the language employed could be glibly avoided by testimony that some other document, never even seen by the court, was subject to a different interpretation.

As a matter of fact, the appellant produced one other form of contract as a basis for its proof of custom (Plf's. Ex. 12). It submitted this form to

the witness Force (Tr. 129) and asked about the custom with respect to it, and this witness, called by appellant, stated that he would not want to say that there was any recognized custom of the nature asserted by appellant. It must be conceded that the same consequence, or others equally damaging to appellant, might have attended the production of any of the other "similar" contracts to which appellant's offer of proof refers.

Manifestly, where it is sought to show a custom or usage contrary to the meaning of language as announced by the courts, the testimony addressed to that subject cannot be of the doubtful and remote character which appellant suggests, but must be clear, pertinent and direct.

CONCLUSION

In conclusion, appellee submits that the decision should be affirmed because:

1. The overwhelming weight of authority gives to the *force majeure* clauses legal consequences exonerating appellee from liability.

2. The contracts as a matter of law are not subject to variation by proof of custom or usage.

3. In any event, the district court found as a fact that no custom or usage, of the nature asserted by appellant, existed and that finding based upon conflicting and variable evidence should not be disturbed on appeal.

Respectfully submitted,

McMicken, Rupp & Schweppe,
Alfred J. Schweppe,
J. Gordon Gose,
Attorneys for Appellee.